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FEDERAL CONTROL OF INTERSTATE COMMERCE[1]

FROM an early day our English forefathers were strenuous advocates of freedom of commerce. The forty-first article of Magna Charta provided:

> "All Merchants shall have safety and security in coming into England, and going out of England, and in staying and in traveling through England, as well by land as by water, to buy and sell, without any unjust exactions, according to ancient and right customs, excepting in the time of war, and if they be of a country at war against us: and if such are found in our land at the beginning of a war, they shall be apprehended without injury of their bodies and goods, until it be known to us, or to our Chief Justiciary, how the Merchants of our country are treated who are found in the country at war against us; and if ours be in safety there, the others shall be in safety in our land."

The Declaration of Independence enumerated, among those acts of tyranny which entitled our people "to dissolve the political bands which have connected them with another, and to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them," . . . the "Cutting off our trade with all parts of the world."

The Articles of Confederation, entered into by the states on November 15, 1777, secured to the citizens of each state the right to carry on trade and commerce with other states, but left each state free to impose such impositions, duties and restrictions on trade and com-

[1] This article is a revision of a portion of an address delivered by the writer before the Commercial Club of Kansas City, Mo.

merce as it might choose, provided the same should apply equally to its own citizens as to those of other states, and provided they did not interfere with stipulations in treaties duly made under the Articles of Confederation.

Commerce is the life blood of a nation. The arteries through which it flows, like those of the animal kingdom, cannot be obstructed but congestion sets in, disease develops, and healthy life is impossible. After the confederation, as the historian Schouler says:

> "The commercial states obstructed the non-commercial; and New Jersey, lying between two such great ports as New York and Philadelphia, was likened to a cask tapped at both ends. Without authority to regulate commerce, Congress found the treaty-making power conferred upon it of little practical avail."

Each state imposed duties and imposts according to its own ideas of its own advantage. Connecticut taxed Massachusetts' imports higher than the British.

> "This downward course of things in America," says Schouler, "arrested the attention of thoughtful citizens. It was quickly perceived that, unless Congress should procure two things, the authority to regulate foreign commerce and power to collect a federal revenue, the situation was desperate."

This state of things brought about the great convention in Philadelphia, where the counsels of the wise men prevailed, and the new Constitution was framed "in order to form a more perfect Union." It vested the national Congress with the broad, comprehensive power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes"; and

> "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

It forbade the states "without the consent of the Congress" to "lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, . . . and all such laws shall be subject to the revision and control of the Congress."

The grant of authority to regulate interstate and international commerce secured to the national government a power immeasurable in its extent and indescribable in its importance.

The framers of the Constitution, with that marvelous prescience which characterized their work, placed in the hands of the national government the exclusive power to regulate commerce between the states and with foreign nations without qualification or restriction. It was really the power to preserve national existence.

The acts of Congress providing for the creation of states out of the territory lying north of the Ohio River directed the setting apart of a portion of the net proceeds of the sale by Congress of public lands lying within those states to defray the expenses of laying out and making public roads leading from the navigable waters emptying into the Atlantic to the Ohio River, and through those states, with the consent of the states through which the roads should pass. Under these acts, beginning in 1808, Congress made appropriations for building what was known as the Cumberland Road, from the Potomac River to the Ohio, and its extension through the states of Ohio, Indiana, and Illinois to the Mississippi.

This highway entailed great expense, and the numerous applications for money for that purpose aroused considerable opposition in those states not directly benefited by it. In 1822 a bill was passed providing for the erection of toll gates on the Cumberland Road, and the collection under national authority of tolls for passage over it. President Monroe, however, vetoed the bill on the ground that it was of doubtful constitutionality, and transmitted to Congress with his veto an elaborate memorandum in which he contended that the constitutionality of the act could not be sustained under the grant to Congress of the power "to regulate commerce among the states."

"Commerce between independent Powers or communities," he said, "is universally regulated by duties and imposts. It was so regulated by the States before the adoption of this Constitution, equally in respect to each other and to foreign Powers. The goods and vessels employed in the trade are the only subjects of regulation. It can act on none other. A power, then, to impose such duties and imposts in regard to foreign nations and to prevent any on the trade between the States, was the only power granted." [1]

In striking contrast with this narrow conception of the scope of the power granted was the opinion of Chief Justice Marshall, rendered two years later, in deciding that an act of the legislature of New York, granting to Robert R. Livingston and Robert Fulton for a term of years the exclusive navigation of all the waters within the

[1] Annals of Congress, 17 Cong. 1st Sess., Vol. 39, p. 1833.

jurisdiction of that state with boats moved by fire or steam, was invalid because of the Commerce Clause in the Constitution, so far as such act prohibited vessels licensed under the laws of the United States to carry on the coasting trade, from navigating the waters of the State of New York by means of fire or steam.[1]

President Monroe's theory that the only power granted by the Constitution was to impose duties and imposts with regard to foreign trade and to prevent any on interstate commerce was brushed ruthlessly aside. The subject to be regulated, said the Chief Justice, is commerce. "Commerce undoubtedly is traffic, but it is something more: it is intercourse." It comprehends navigation. It comprehends every species of commercial intercourse among the states and between the United States and foreign nations. "It describes the commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."[2]

The power granted, he declared, was to regulate, — that is, to prescribe the rule by which commerce is to be governed. "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution."[3] It is a fact of much significance that the first great interpretation of this power to regulate interstate commerce should have been given in holding invalid, as contrary to its provisions, an attempted state grant to individuals of a monopoly in steam navigation over the waters of the greatest commercial state of the Union.

Only three years after this decision the Supreme Court declared invalid, as contrary to the constitutional prohibitions against the laying by the states of imposts or duties on imports or exports, as well as of the grant to Congress of power to regulate interstate commerce, an act of the State of Maryland requiring, under penalty, all importers of foreign goods and persons selling the same to take out a license.[4]

The power to regulate interstate commerce, said Chief Justice Marshall,

"is coextensive with the subject on which it acts and cannot be stopped at the external boundary of a State, but must enter its interior. . . . If this

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[1] Gibbons *v.* Ogden, 9 Wheat. 1. [2] *Ibid.* 189. [3] *Ibid.* 196.

[4] Brown *v.* Maryland, 12 Wheat. 419.

power reaches the interior of a state, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse: one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. . . . Congress has a right, not only to authorize importation, but to authorize the importer to sell." [1]

After President Monroe's veto of the Toll Bill, Congress adopted a policy of gradual abandonment to the states of the control of the Cumberland Road, and ultimately surrendered to them all of its interests therein.

Not until the year 1862, did Congress undertake again to exercise the power to regulate interstate commerce by aiding in the construction of interstate highways. In that year the first of the acts to incorporate the Union Pacific Railroad for the construction of a transcontinental line of railroad was passed. This was followed in rapid succession during the next few years by acts incorporating the Northern Pacific Railroad Company, the Atlantic and Pacific Railroad Company, and the Texas and Pacific Railroad Company, to construct other lines of railroad across the continent.

Care was taken in some of these acts not to offend the susceptibilities of the states by the assertion of exclusive national control. The original Union Pacific line ran wholly through territories of the United States. The line of the Northern Pacific Railroad, however, ran through some of the states, and the Act of Congress by which it was incorporated required it to obtain the consent of the legislatures of the states through which it might pass previous to commencing the construction thereof, although authorizing it to put on engineers and survey the route before obtaining such consent. No such condition was imposed in the act creating the Atlantic and Pacific Railroad Company; but that corporation was expressly authorized by Congress to construct and maintain a continuous line of railroad from Springfield, Missouri, to Albuquerque, New Mexico, and thence to the Pacific, with a branch in the State of Arkansas; and for that purpose was authorized to enter upon and condemn such lands as might be necessary. The same policy was observed in the incorporation of the Texas and Pacific Railroad

[1] *Ibid.* 446–447.

Company. The constitutionality of all these acts was upheld by the Supreme Court.

By the Act of 1862, Congress authorized the Central Pacific Railroad Company of California to construct a railroad and telegraph line from the Pacific Coast, at or near San Francisco, to the eastern boundary line of California, and also authorized the Central Pacific to unite with the Union Pacific in constructing the railroad from California to the Missouri River. By consolidations also authorized by Acts of Congress, the Central Pacific Company acquired some of its most important franchises.

In holding that these franchises could not be taxed by the State of California, the Supreme Court, speaking by Mr. Justice Bradley, used this language:[1]

"It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several States, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent, the Cumberland or National Road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject. Of course the authority of Congress over the Territories of the United States, and its power to grant franchises exercisable therein, are, and ever have been, undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, traversing States as well as Territories, and employing the agency of state as well as federal corporations.[2]

"Assuming, then, that the Central Pacific Railroad Company has re-

[1] California *v.* Pacific R. R. Co., 127 U. S. 1–39.

[2] See Pacific Railroad Removal Cases, 115 U. S. 1, 14, 18.

ceived the important franchises referred to by grant of the United States, the question arises whether they are legitimate subjects of taxation by the State. They were granted to the company for national purposes and to subserve national ends. It seems very clear that the State of California can neither take them away, nor destroy nor abridge them, nor cripple them by onerous burdens. Can it tax them? It may undoubtedly tax outside visible property of the company, situated within the State. That is a different thing. But may it tax franchises which are the grant of the United States? In our judgment, it cannot."

But these transcontinental lines were exceptional; the great extension of railroad construction was through private enterprise acting under state incorporation; and it was not until flagrant examples of discrimination by the managers of railroad companies in favor of some classes of shippers over others had become so notorious and so burdensome as to provoke an outspoken national protest, that the Congress, in comprehensive form, asserted, in the exercise of the power to regulate commerce, the right to control the operations of interstate railroads by state corporations, and to declare unlawful, and through the creation of a Commission on interstate commerce to prevent, the discriminatory practices which had grown up. Absolutely essential to any trade or commerce is the highway over which must pass the subjects of trade and commerce. With rare exceptions the free use of the natural waterways has always been recognized. No discrimination in the use of highroads or turnpikes appears to have ever been practiced. But the conception of a railroad as a public highway open to the use of all alike, without discrimination, without favoritism, and upon fair and reasonable terms, was singularly late in developing. The attitude of most railroad managers was until a very recent date, and to some extent still is, that the railroad is a private enterprise to be controlled as its officers please, to be operated on such terms and at such rates as they think best, and to be free from any governmental interference.

Commerce is defined to be the "exchange between men of the products of nature or art; buying and selling together; trade; exchange of merchandise, especially as conducted on a large scale between different countries or districts, including the whole of the transactions, arrangements, etc., therein involved." [1]

Trade once meant literally a path. The idea of commerce then

[1] Oxford Dictionary.

embraces, first, the exchange between men of the products of nature or art, and, secondly, the path or highway over which the merchants and their merchandise pass and repass in carrying on commercial intercourse. The Interstate Commerce Act sought to make the railways highways of commerce open to the use of all commerce on equal terms for reasonable rates and without unjust discrimination between the users. It did not attempt to reach water-bound commerce, except when used in connection with a railroad as part of a through route. No great abuse had arisen with respect to water carriage only. The rivers and the sea were free to all. No ship could have a monopoly of the right of navigation; no group of shippers could create a monopoly. The water highways were open to others on precisely the same terms as to them, for the great case of Gibbons *v.* Ogden had determined that no state could create a monopoly in the right of navigation in its waters. A railroad, however, preëmpted a pathway; existed by virtue of the authority of the people; derived its powers of location and operation from the states, and subverted and abused that authority when it served some of the people on terms which operated to the disadvantage of others similarly situated.

So the Interstate Commerce Act of 1887 declared that charges made for services in the transportation of persons or property among the states must be reasonable, and that no carrier should charge any greater compensation for the transportation of passengers or of like kind of property under substantially similar circumstances or conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included in the longer distance; made it unlawful for any common carrier subject to the act to give any unreasonable preference or advantage to any particular party or locality or species of traffic; required every carrier to afford reasonable and equal facilities for the exchange of traffic between their respective lines; prohibited pools and combinations between carriers; required the publication of rates and forbade the collection of any but the published rate, and provided for the appointment by the President, with the advice and consent of the Senate, of a Commission of five with powers to investigate and prosecute violations of the act.

The act marked a great departure. It met with determined opposition on the part of the railroad companies. The orders of the Commission were challenged in the courts, and the terms of the

act were very generally disregarded. In 1903 the Elkins Act was passed, making violations of the Interstate Commerce Act by corporation-carriers misdemeanors, and imposing heavy penalties therefor, and also making it a misdemeanor punishable with heavy fines to offer, grant, give, solicit, accept, or receive any rebate or discrimination in respect of the transportation of property in interstate or foreign commerce.

Despite these acts, the evidence of a persistence by the railroads in discriminatory practices was so overwhelming, that during the session of 1905–06 the Hepburn Bill, after a prolonged and exhaustive discussion, was passed by Congress. This act extended the scope of the Commerce Act by including within its provisions oil and pipe-line companies and express and sleeping-car companies. It regulated and restricted the granting of free transportation; provided more specifically for the printing and posting of schedules of rates, fares and charges; required terminal, storage and icing charges to be separately stated; provided that no change in rates or charges should be made except after thirty days notice to the Commission and the public; made officers and directors of corporations subject to the act liable to fine and imprisonment for violations of its provisions; authorized the Commission on complaint made to investigate any alleged violation of the act, and into the reasonableness of any rate, charge, or practice, and to make an order requiring the carrier to desist from such violation and to make no charge in excess of a maximum rate or charge to be fixed in the order; and, on like complaint, to establish through routes and maximum joint rates, provided no reasonable or satisfactory through route should then exist, and authorized the Commission to award damages to any party aggrieved by the unlawful act of a carrier subject to the act.

The Commission was enlarged to seven members, to serve seven years each, the terms of one of them to expire each year, and no more than four to be of one political party.

This act became effective August 28, 1906. It has now been in operation upwards of three years. While on the one hand it has failed to accomplish the work of destruction which was freely predicted of it by those who opposed its enactment, it has also failed to cure all the evils against which it was directed.

One of the fundamental objections urged to the present organization and functions of the Interstate Commerce Commission is that

it combines legislative, administrative, and *quasi*-judicial functions. The power of making rates for future application is a legislative function, which, it is well settled, cannot be devolved upon a court. The reasonableness of rates fixed by the Commission, that is, the question whether or not they are confiscatory and deprive the carrier of a reasonable return upon his investment, is a judicial question, which cannot be left to the Commission. These constitutional difficulties are at the source of much of the trouble which has been experienced in the effectiveness of supervision by the Interstate Commerce Commission; and experience has shown that in a large number, if not in the great majority of instances where orders have been made by the Commission of more than trivial importance, the carriers affected have brought suit and obtained injunction restraining the enforcement of the order until its reasonableness should be investigated by the courts. This system involves constant reversal by the courts of orders of the Commission, prolonged delays in the enforcement of orders, conflict of decision between the different courts, and much uncertainty in the law. Complaint has also been made that, while the Commission, under the present law, is empowered to review the reasonableness of a rate or a practice, and to fix a maximum beyond which the rate may not be enforced, it is without power to review classifications of commodities carried, — a subject of equal importance with the fixing of a maximum rate. Under the present act, too, a carrier may file a proposed increase in rates, which, at the expiration of thirty days after filing and publication becomes the lawful rate, and which may not be investigated or attacked until after it has become effective, and then only upon complaint filed. If such complaint be made, and investigation disclosing the fact that the rate is unreasonable, the Commission orders it to be reduced, the enforcement of the order may be enjoined by proceedings in court, and months and even years elapse before it takes effect, during all of which time, of course, the increased rate is collected.

To meet these objections certain suggestions have been made. For the purpose of preventing the conflict of decision and the delays and uncertainties in the enforcement of the law which now exist, it is proposed to create a special tribunal to be known as the Commerce Court, in which shall be exclusively vested all the jurisdiction now possessed by the Circuit and District Courts and the

Circuit Courts of Appeals of the United States with respect to the enforcement or review of orders and decrees of the Interstate Commerce Commission; and that all applications for injunctions to restrain orders of the Commission be heard by all the judges of this court, whose orders and decrees shall be final except that an appeal may be taken to the Supreme Court of the United States from final decrees in cases where a constitutional question is involved. For the purpose of removing the Commission from the position of prosecutor or litigant, it is proposed that all proceedings to enforce or defend orders of the Interstate Commerce Commission shall be conducted by the Department of Justice.

The further suggestions are that the Interstate Commerce Act be amended as follows:

1. By providing that the Commission be specifically empowered to review classifications, both as to items and grouping.

2. By providing that whenever a new rate or classification shall be filed, the Commission may at once, either upon its own initiative or upon complaint, institute an inquiry into the reasonableness or justice of such rate or classification, and in order to facilitate such inquiry may postpone for sixty days the effective date of the proposed new rate or classification.

3. By providing that the Commission may by order suspend, modify or annul any changes in rules or regulations which impose undue burdens on shippers.

4. By providing that the Commission may proceed either on its own motion or upon complaint filed with it, and that in proceedings on its own initiative, it may exercise like powers to those which it may exercise in proceedings based on complaints of third parties.

5. By specifically empowering the Commission, on the application of one carrier or of an individual, or at the instance of the Commission itself, to compel connecting carriers to unite in forming a through route and fix the rate and the apportionment thereof among the carriers.

6. By providing that it shall be lawful for carriers to unite in fixing a rate or rates, provided the same be filed and published; the question of the reasonableness and justice of such rate to be subject to the other provisions of the act in like manner as any other filed and published rate; the agreement, however, not to amount to a contract to maintain the rate for any given time, but each party to

have the right, independently of the other, at any time to withdraw from or alter such rate in conformity with the other provisions of the statute.

The purpose of this proviso is to protect the carriers from the penalties of making an agreement to restrain trade in violation of the Sherman Act.

7. By specifically empowering the Commission to prescribe rules and regulations under which shippers shall have the privilege of designating the route over which their shipments shall be carried to destination.

8. By providing that the agent of a railroad company shall be compelled, on written request, to state in writing the legal rate over the line of the carrier, including any joint rate to which such carrier is a party, and imposing a fine as a penalty for stating an erroneous rate in pursuance of such request.

9. By providing that after the passage of the amending act, no railroad company shall acquire stock in any competing railroad company.

10. By providing that after the passage of the amending act, no railroad company engaged in interstate commerce shall issue, for less than their par value, any additional stock or bonds or other obligations (other than notes maturing not more than twelve months from date of issue) except with the approval of the Commission, based upon a finding that the same are issued for a price not less than the reasonable market value for bonds, and if either stock or bonds be issued for property, then at the fair value thereof as determined or approved by the Commission.

These modifications in the act would, it is believed, make it a complete and effective measure for securing reasonableness of rates to all, and fairness of practices in the operation of interstate railroad lines, without undue preference to any individual or class over any other.

But transportation facilities only constitute the machinery by which commerce is carried on. All transportation is commerce, but all commerce is not transportation. Definitions as to what constitutes interstate commerce, said Mr. Justice Peckham in the case involving the validity of the agreements under which was conducted the business of the Kansas City Stockyards,[1] "are not easily given

[1] Hopkins *v.* United States, 171 U. S. 578–597.

so that they shall clearly define the full meaning of the term. . . . We know from the cases decided in this court that it is a term of very large significance. It comprehends, as it is said, intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale and exchange of commodities between the citizens of different States, and the power to regulate it embraces all the instruments by which such commerce may be conducted."

"Commerce among the states," said Mr. Justice Holmes in the Beef Trust Case,[1] "is not a technical legal conception, but a practical one, drawn from the course of business."

The right to engage in interstate commerce derives its source, as Chief Justice Marshall said in Gibbons *v.* Ogden,[2] "from those laws whose authority is acknowledged by civilized man throughout the world. . . . The Constitution found it an existing right and gave to Congress the power to regulate it."

With the tremendous commercial impetus that followed the Civil War, largely through the use of special and generally secret advantages in rates and facilities of transportation, the principal manufacturing and commercial industries of the country became concentrated in the hands of small groups of men, who by those means, with the aid of borrowed capital and with the machinery of intercorporate stock ownership, acquired a control of markets and a power of destroying all competition, which, it was perceived, could only be checked by national legislation.

Accordingly in the year 1890, in the exercise of the power to regulate interstate commerce, Congress passed the act known as the Sherman Anti-Trust Law. This act was approved by the President, July 2, 1890. It was fitly entitled "An Act to protect trade and commerce against unlawful restraints and monopolies." It has been before the Supreme Court of the United States in upwards of a dozen notable cases. Its constitutionality was attacked, but upheld. Its scope, meaning, and effect have been minutely analyzed. Yet it may be confidently asserted that no law on the statute books is so generally misunderstood. Its provisions are so comprehensive and unqualified that a literal strained interpretation has become commonly accepted not only among laymen, but even among lawyers. Yet, in one of the first cases which arose under its provisions, the Supreme Court de-

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[1] Swift & Co. *v.* United States, 196 U. S. 375–398.

[2] 9 Wheat. 1–211.

clared that the act must receive a reasonable construction or else there would scarcely be an agreement or contract among business men that could not be said to have indirectly or remotely such bearing on interstate commerce as to bring it within its condemnation. The literal construction was pressed upon the Supreme Court as a reason for holding that the act was not a constitutional exercise of power by Congress, and it was urged, in one of the early cases, that if upheld, it would by its terms operate to prevent the formation of corporations to carry on any particular line of business by those already engaged therein, or contracts of partnership or employment between persons previously engaged in the same line of business and the like. But the court disclaimed any such intention on the part of Congress, saying that the formation of corporations for business or manufacturing purposes had never, to the knowledge of the court, been regarded as in the nature of a contract in restraint of trade or commerce, and that the same might be said of the contract of partnership. Of course, both corporate and copartnership organizations might be employed as machinery for imposing an unlawful restraint upon the otherwise free current of interstate trade, or for the purpose of creating a monopoly. Wherever such purpose is discovered or such result attained, the act is broad enough to furnish a remedy. The stream must not be dammed, the waters must not be impounded for the use of a favored few and to the exclusion of others.

Carefully and logically has that great court analyzed and applied the act in every case which has presented some phase of its meaning for judicial construction or application. An accurate analysis of all the decisions of that tribunal, it is believed, will demonstrate that, wherever the act has been held to apply, the evidence conclusively showed that the contract, combination, or conspiracy in question was entered into either (1) with a specific intention to restrain trade or create a monopoly, or (2) that it was of such character that its necessary effect was to directly restrain trade or create a monopoly. But the fact that despite the actual decisions by the Supreme Court in those controversies which have come before it, some judges still persist in giving to the statute a literal interpretation and claiming for it the extreme application which the justices of the Supreme Court have repelled and the court itself refused, coupled with the criminal liability imposed on all those affected by its prohibitions, would seem to justify, if not to demand, that the act should be so amended as to

clearly relieve it from any foundation for the unreasonable effect attributed to it, which goes so far beyond the mischief which the act was designed to remedy.

If amended at all, the terms of the act should discriminate between a declaration of the illegality of contracts and combinations in restraint of interstate commerce, and a more precise definition of the acts with respect to such contracts, combinations, and conspiracies which properly constitute criminal offenses. At common law, contracts in general restraint of trade were void in the sense of being non-enforceable in the courts. Parties to such contracts were left to their observance or neglect as they might see fit; the courts would take no cognizance of them. A similar rule might be declared with respect to contracts of that character in so far as they have to do with interstate commerce, unless they operate to control prices, exclude third parties from participating in interstate commerce, or tend to the creation of monopolies. When entered into with such intent, or under such circumstances as necessarily to imply such intent, then and only then should criminal liability clearly exist.

It has been said by the Supreme Court that the Sherman Act struck at combinations that unduly restrain because they monopolize the buying and selling of articles which are to go into interstate commerce. One of the definitions of the word "trust" contained in the Sherman Act at one stage of its passage through Congress was "a combination to create a monopoly." Undoubtedly the prime objection to contracts that stifle competition is that they tend to the establishment of a monopoly; and monopolies always interfere with general freedom of trade and commerce. If, therefore, criminality in connection with contracts, combinations, or conspiracies in restraint of trade be limited to those entered into with intent and purpose to control prices, or to prevent competitors in such trade from engaging or continuing therein, or for the purpose of creating a monopoly in interstate trade or commerce, full force and effect would seem to be given to the underlying purposes of the Sherman Act.

Much discussion has taken place over the question whether or not the Sherman Act included within its denunciation contracts which do not unreasonably restrain trade. Mr. Justice Peckham in the Trans-Missouri case,[1] and Mr. Justice Harlan in the Northern Securities case,[2] declared that the act is not limited to restraints of

[1] 166 U. S. 290. [2] 193 U. S. 197.

interstate and international trade or commerce that are unreasonable in their nature, but that it embraces all direct restraints imposed by any combination, conspiracy, or monopoly upon such trade or commerce. On the other hand, Mr. Justice Brewer in the Northern Securities case objected to this doctrine as not being necessary to the decision of that case, or to any of the earlier decisions of the court, and affirmed that Congress did not intend to reach and destroy those minor contracts in partial restraint which the long course of decisions at common law had affirmed were reasonable and ought to be upheld. This view of the law would seem to be sustained by the actual decisions of the court; and a provision inserted in the act specifically excepting from its provisions agreements in partial restraint of interstate or international trade or commerce which are not unreasonable, and which are valid by the rules of the common law, would only write into it that express meaning which the Supreme Court has ascribed to it.

The great purpose to be borne in mind in connection with this and similar legislation, is always the preservation of the freedom or liberty to trade. The great vice of monopolies and combinations in restraint of trade is that they interfere with the rights of others than the parties to them. If two competitors in business form a partnership and agree to conduct for their joint account a business which they have theretofore conducted in rivalry with each other, assuredly no public interest is injured. Unrestricted competition which becomes destructive is not beneficial either to those engaged in it, or to the state. But where two or more persons combine to prevent a third from engaging in trade or commerce, except upon terms and conditions prescribed by the combination, and take some action to carry out the purposes of such combination, then, on fundamental principles of the common law, an actionable injury arises; and where the injury affects a large enough body of the people, a public right of interference is created.

This is the basis of the legislation against combinations and monopolies. They impair that right which the English law has always esteemed of immeasurable value to the community, inhering in every man, to pursue trade and commerce as he will, without let or hindrance, except in so far as he may trench upon similar rights exercised by others.

I have spoken of the highways or pathways of commerce, and of the right of the citizen to carry on trade or commerce between the

states at will without interference; but modern business is rarely conducted on a large scale by individuals. The amount of capital required has compelled coöperation by many under arrangements limiting the liability of the associates which can only be secured by corporate organization. With singular disregard of the underlying principle which gave to the national government full power to regulate commerce between the states, the Supreme Court of the United States, when the question first arose, held that a corporation formed under the laws of one state could only transact business in another state with the leave of that state, and upon complying with any terms and conditions which it chose to impose. In the exercise of this conceded right, a veritable upas tree of conflicting legislation has grown up in the different states, making it wellnigh, if not absolutely impossible for any corporation formed under the laws of one state to do business in a considerable number of other states. When a stream is dammed at one point, the accumulated head of water seeks an outlet at some other point where there is less resistance. So, in avoiding the consequences of this legislation, there was invented the most potent instrument for the creation of vast combinations of capital, and far-reaching and comprehensive monopolies, ever devised by man; namely, the holding corporation. By this expedient, through the expenditure of a much smaller sum than would have been needed to acquire the direct ownership of properties, the control of comparatively small groups of men has been extended over numerous areas, until, unless checked by government, some of the principal industries of the country were in a fair way to become as completely monopolized as though by royal grant they had the exclusive right of sale: that most obnoxious form of monopoly against which the famous anti-monopoly of James I was particularly directed.

No doubt, the Sherman Act is sufficiently comprehensive to reach and destroy such monopolies as these, but at the same time that the national government forges a weapon to destroy such abuses it must provide a substitute for those legitimate enterprises which are equally dependent for their existence upon the system so abused. It must therefore provide a means of enabling coöperative enterprise to engage freely and openly in interstate and foreign commerce without the interferences by state action which fetter, confine, and destroy the possibility of such free pursuit. This can only be done by the enactment by Congress of a law providing for the formation of corpora-

tions to engage in trade and commerce among the states, protecting them from undue interference by the states, and regulating their activities so as to prevent the recurrence, under national auspices, of those abuses which have arisen under state control. Such a law should provide for the organization and management of trading corporations; for the issue of their stock, either without par value, and then to such amount as the promoters might think advantageous, or if issued with par value, then to an amount equal only to the cash paid in on the stock; or, if the stock be issued for property, then at a fair valuation ascertained with the approval of a department of the government having supervision of such corporations, after a full and complete disclosure of all the facts pertaining to the value of such property and the interest therein of those who are to turn it into the corporation in exchange for stock. It should protect the corporations organized under it from undue interference by state authorities, subjecting its real and personal property only to such taxation as is imposed by the state upon other similar property located therein; and it should require it to file full and complete reports of its operations with the Bureau of Corporations, or some other similar office, at regular intervals. Such corporations should be prohibited from acquiring or holding stock of other corporations. The power to regulate interstate commerce is believed to be broad enough to authorize such legislation. It has been upheld when directed to corporations carrying on other forms of interstate commerce, transportation, navigation, etc.

These agencies of commerce, thus created under national authority, should appeal to legitimate investors and to legitimate enterprise. They would not afford the same opportunity for stock watering and stock juggling as exists to-day under the complex and conflicting regulations of many states; but they would offer to honest, conservative management and to prudent investors a security which does not exist under the present system; and if availed of to a large extent, it might be found advisable by Congress at some future time to prohibit trading corporations, organized under state laws, from engaging in interstate commerce. This, however, should be considered only if the success of voluntary organization under national law should be so demonstrated as to make it clearly appear contrary to the general welfare that no other than national corporations should engage in interstate trade.

These suggestions involve no novel principles. They are merely

the application to meet the needs resulting from growth. "Commerce," said Mr. Justice Johnson, in the great case of Gibbons *v.* Ogden,[1] above referred to, "in its simplest signification, means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce; the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulation." As regards commerce between the states and with foreign nations, they become the objects of federal regulation. Only the national government is possessed of powers adequate to the regulation of modern commerce: transportation, business, and the organization of capital to carry on interstate business. This power imposes a responsibility to exercise it as occasion demands, and when exercised, to make it adequate, comprehensive, and effective.

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[1] 9 Wheat. 1–229.